Supreme Court, U.S.
FILED
DEC 28 2001
CLERK

No. 01-0792

In The

Supreme Court of the United States

TINA SCHEVE and MARK W. STEVENS,

Petitioners,

vs.

THE MOODY FOUNDATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OR CERTIORARI

BACKGROUND

Tina Scheve ("Scheve") filed suit in the Southern District of Texas, Galveston Division, alleging that her employer, The Moody Foundation, fired her on April 20, 1999, after finding out that a Pap smear taken April 5, 1999, indicated "possible cancer." According to Scheve, The Moody Foundation somehow found out about the Pap smear test results through, and by conspiring with, its insurer American National Insurance Company ("ANICO"), and The Moody Foundation then terminated Scheve's employment to avoid paying medical expenses. These allegations still form the basis of Scheve's live pleading in this case.

During the six months following the filing of the lawsuit, The Moody Foundation unsuccessfully attempted to obtain the relevant medical records from Scheve. Finally, after filing a motion to compel discovery and for sanctions, The Moody Foundation obtained these records only to discover that the Pap smear was taken on April 23rd, not April 5th, and that the test result was not reported until May. The Pap smear, accordingly, was taken after her employment had already been terminated, rather just prior to termination as alleged in the complaint. Further, The Moody Foundation discovered that the name of the physician Scheve had specified was not the physician which had, in fact, performed the Pap smear test.

Despite The Moody Foundation's pleas for dismissal of the case, Petitioners proceeded to engage in a course of

conduct which ultimately resulted in the shifting of attorneys' fees to Scheve and her attorney. A frivolous request for leave to amend the complaint sought joinder of ANICO and an individual defendant. The Moody Foundation informally notified Petitioners that the factual basis for the proposed amendment was defective. Petitioners, however, refused requests to withdraw the motion, forcing The Moody Foundation to prepare a written response. Because plainly based upon erroneous factual allegations which could have easily been verified, the motion for leave to amend was denied.

Petitioners thereafter engaged in improper discovery conduct, such as refusing to answer direct questions posed in interrogatories (e.g., "are you currently being treated for cancer?"). This course of conduct continued in Petitioners' responses to The Moody Foundation's motions for summary judgment and for fee-shifting, with Petitioners' "injection of wholly extraneous cases, facts, personalities, secondary and tertiary relations with people connected to the Foundation." *Petition, App. F* at 44. The Moody Foundation repeatedly, but unsuccessfully, asked Petitioners to dismiss the case.

The district court granted The Moody Foundation's request for summary judgment based upon substantial evidence that Scheve's termination was the result of unsatisfactory job performance and upon Petitioners' failure to provide evidence which could create an inference that The Moody Foundation's conduct was motivated, at least in part, by a desire to deny Scheve her ERISA benefits. *Petition, App. D* at 12-32. The summary judgment evidence established that Scheve's performance had deteriorated markedly in the months prior to her termination.

Documented performance problems included poor attendance and tardiness, failure to learn the duties of her position, and a poor manner in dealing with the public. *See Petition, App. D* at 15 (documented poor performance). Scheve had also been counseled concerning these performance deficits. *Id.* The only evidence tendered to refute The Moody Foundation's evidence of poor performance was Scheve's own affidavit stating that she disagreed with The Moody Foundation's assessment.

Scheve temporarily abandoned the ANICO conspiracy argument. *But see Petition* at 12 (apparently resurrecting the conspiracy argument: "employers and insurers . . . rigging the ouster of a worker"). In essence, her new theory was (1) Plaintiff worked for Defendant; (2) Plaintiff scheduled Pap smears; (3) Plaintiff was fired, and therefore, (4) Defendant fired Plaintiff due to fear of the Pap smear results. The only evidence purportedly showing pretext was: (1) Scheve's own allegation that she told her supervisor, shortly before her termination, that she was scheduled for a Pap smear; (2) Scheve was terminated; and (3) The Moody Foundation (for its own internal records) placed memoranda in Scheve's personnel file explaining the reasons for termination. *See Petition, App. D* at 23. The Moody Foundation tendered evidence showing that (1) Scheve's supervisor did not recall any conversations with Scheve about Pap smears and did not tell any other Moody Foundation employees about Scheve's scheduled Pap smear test and (2) The Moody Foundation's Director, the person responsible for the decision to terminate Scheve, knew nothing about any Pap smear test at the time Scheve's employment was terminated.

In any event, nothing in the record suggests that an employer's knowledge of an employee's upcoming annual Pap smear would motivate discharge of the employee. Further, even if The Moody Foundation had been fully aware of Scheve's medical condition, it simply would not have made any sense to terminate Scheve based upon a diagnosis of dysplasia, a relatively common, easily treated condition which Scheve's own physician specified as being appropriate for "conservative treatment." As the district judge noted at the summary judgment hearing, under Scheve's theory, an employer would have to discharge all its female employees once a year. *Petition, App. D* at 17.

The hearing on fee-shifting was not attended by Scheve's counsel, Mark W. Stevens ("Stevens") apparently because of a failed facsimile notification. The district judge, accordingly, did not hear oral argument but read his findings and conclusions, based on the motion, the response, and the summary judgment evidence, into the record. *See Petition, App. F* at 33-51. At the hearing, the court discussed the ERISA fee-shifting factors enumerated in *Iron Workers Local #272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980), fee-shifting under Rule 11, imposition of fees on counsel pursuant to 28 U.S.C. § 1927, and the court's inherent power to deter vexatious conduct. *See id.* Costs and fees were shifted under ERISA, Section 1927 and Rule 11 as compensatory. *Id.* at 41. The court also ordered fee-shifting under the court's inherent power to deter malicious and extortionist litigation. *Id.* at 49.

Although Scheve's counsel now seems to complain that the court ruling in his absence was improper Stevens

did not make such a complaint to the district court. Instead of requesting a rehearing or filing a motion under Rule 59 or 60 of the Federal Rules of Civil Procedure, Petitioners immediately filed a notice of appeal.

The appellate brief filed by Petitioners, like virtually all of Petitioners' pleadings and motions in the district court, included numerous factual allegations which were inaccurate, misleading, irrelevant, or not supported by the record. After hearing oral argument, the court of appeals issued a short *per curiam* decision affirming the district court's judgment.

MISSTATEMENTS IN THE PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari is a continuation of Petitioners' unreasonable and vexatious course of conduct which, once again, needlessly causes The Moody Foundation to incur additional legal expenses. Rule 15(2) of the Supreme Court Rules admonishes the respondent to point out any perceived misstatement made in the petition. Repeated misstatements of fact, deceptive use of out-of-context "sound bites," and interjection of irrelevant material into the proceedings, which weighed heavily in the district court's decision to assess attorneys' fees against Petitioners, are again evident in the Petition:

1. The very first sentence in Petitioners' brief is a misstatement. Petitioners allege "The Moody Foundation controls American National Insurance Company." *Petition* at 3. There is no evidence in the record to establish this

claim. Petitioners also state, The Moody Foundation "controls over 60% of American National Insurance Company" *Petition* at 4. ANICO and The Moody Foundation financial statements were provided to Petitioners during discovery and in fact, as of December 31, 1998, The Moody Foundation owned 23.70% of ANICO's stock. Moreover, even if The Moody Foundation "controlled" ANICO, it is extraneous and irrelevant to Scheve's ERISA claims. Petitioners fail to explain how The Moody Foundation's "control" of ANICO could rationally raise the inference of pretext under the facts of this case.

2. Petitioners repeatedly mischaracterize the memoranda placed in Scheve's personnel file to document the reasons for Scheve's termination as "secret letters". *See Petition* at 5, 6. Petitioners, however, cite no federal requirement that an employer discuss reasons for termination with an employee. Under Texas law an employer does not owe a duty of good faith to its employees and The Moody Foundation was not required to give Scheve any reason at all for her termination. *See City of Midland v. O'Bryant*, 18 S.W.3d 209 (Tex. 2000). Interestingly, the only truly covert activity was Scheve's post-termination tape recording of conversations with Moody Foundation employees. *Petition* at 6. These recordings, however, are never referred to as "secret." *See Petition* at 5, 6.

3. Petitioners complain that, after the termination decision, "Scheve was not fired for two more weeks. The Foundation made no effort to explain why she was worked by the Foundation to within three days of her forthcoming Pap smear, and was fired summarily on April 29, 1999." *Petition* at 6. The "delay" in her termination, however, was not The Moody Foundation's fault.

Scheve, although not on vacation or sick leave, simply did not show up for work during that time period and her employment was terminated on the first day she returned to work.

4. Petitioners state that "Foundation Executive Harold McDonald declined to give any reason for the firing at the time or after . . . " While this statement may be true, Petitioners' inference that Scheve was never told of the reason is false. The summary judgment record establishes that the reasons for the termination were provided to Scheve by others at The Moody Foundation.

5. Petitioners argue that alleging the incorrect Pap smear date in the complaint was excusable because, "without her office calendar, which was left at her desk at the Foundation, Mrs. Scheve told her lawyer that the Pap smear in question had been given on April 5, 1999." *Petition* at 8. This statement is disingenuous because (1) a reasonable investigation to ascertain the date of a medical test (to say nothing of the test results) would include review of medical records, not just reference to an office calendar and (2) Petitioners did not dismiss or amend the complaint after it became clear that the date alleged was incorrect.

6. Petitioners' references to District Court Judge Samuel B. Kent, and Petitioners' inclusion of the transcript of a hearing before Judge Kent as an appendix to this Petition, constitute interjection of irrelevant material into this proceeding. *See Petition* at 9-10, *App. B.* Judge Kent disqualified himself after Petitioners filed a motion to recuse. He had no part in the summary judgment and

fee-shifting decisions which Scheve and her counsel challenge in the Petition.

7. Petitioner's long digression concerning the *LaPaugh* case, and the inclusion of miscellaneous documentation from that case as appendixes to the Petition, interject irrelevant material into this proceeding. *See Petition* at 10-12, *Apps. N* through *S*. The *LaPaugh* case is not cited for its legal findings; rather, it is presented as evidence of a purported conspiracy between ANICO and The Moody Foundation. The decision of another court, a decade ago, concerning parties not involved in the action now before this Court, obviously is improper evidence to establish misconduct on the part of The Moody Foundation or to provide Scheve's counsel with a legitimate excuse to harass The Moody Foundation.

8. Petitioners allege that "the Houston trial Judge on June 20 found 'bad faith' on the basis of the recusal motion." *Petition* at 12. Petitioners further state, as a proposition of fact, "The Houston trial judge ***explicitly*** retaliated against Petitioners for attempting to protect their constitutional right to an impartial forum by filing a recusal motion." *Petition* at 21 (bold and italics in the original). The basis for Petitioners' allegations, however, is an equivocal statement by the district judge which is neither a part of the court's findings nor a basis for the court's conclusions: "What might be a sign of bad faith is that on January 13th, Judge Kent suggested conduct that might be sanctionable, a week later a motion to recuse is filed." *Petition, App. F* at 47. The court's actual findings and conclusions are stated unequivocally and with clarity. *See Petition App. F* at 42-50.

THE PETITION IS BASED UPON MISSTATEMENTS OF FACT AND MISSTATEMENTS OF LAW WHICH DO NOT PROVIDE A PROPER BASIS FOR ISSUANCE OF A WRIT OF CERTIORARI

Issue I: The Fifth Circuit's Requirement that Petitioners Provide Evidence of "Specific Intent" Conflicts with Supreme Court Precedent and Precedents of Other Circuits.

Petitioners complain that the Fifth Circuit Court of Appeals "undermined" ERISA by "the imposition of a 'specific intent' requirement from distinguishable ERISA discrimination cases." *Petition* at 13. They allege, "the panel below resurrected 'pretext plus' under the rubric of 'specific intent' and inserted it as part of the *prima facie* test." *Petition* at 15. Petitioners, however, cite no authority from the Supreme Court, from the courts of appeal, or from the district courts, which rejects the requirement of specific intent in ERISA cases.

It may be open to question whether Petitioners' argument is made in good faith; it is undeniable that the argument is without merit. Specific intent is a required element of Scheve's claims. All circuits have expressly held that an ERISA plaintiff must demonstrate that the employer had the specific intent to violate the plaintiff's ERISA rights. *Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 37 (1st Cir. 1995), *cert. denied*, 516 U.S. 1113 (1996); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988); *Resner v. Arc Mills, Inc.*, 1998 U.S. App. Lexis 22379 at *3 (2d Cir.), *cert. denied*, 525 U.S. 947 (1998); *Eichorn v. AT&T Corp.*, 248 F.3d 131, 149 (3d Cir. 2001), *cert. denied*, 70 U.S.L.W. 3316 (Oct. 29, 2001); *Conkwright v. Westinghouse Electric Corp.*, 933 F.2d 231, 238 (4th Cir.

1991); *Unida v. Levi Straus & Co.*, 986 F.2d 970, 979-80 (5th Cir. 1993); *Holtzclaw v. DSC Communications Corp.*, 255 F.3d 254, 260 (5th Cir. 2001); *Walsh v. United Parcel Service*, 201 F.3d 718, 728 (6th Cir. 2000); *Little v. Cox's Supermarkets*, 71 F.3d 637, 642 n.3 (7th Cir. 1995); *Jefferson v. Vickers, Inc.*, 102 F.3d 960, 964 (8th Cir. 1996); *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 881 (9th Cir. 1989), *cert. denied*, 498 U.S. 814 (1990); *Phelps v. Field Real Estate Co.*, 991 F.2d 645, 649 (10th Cir. 1993); *Winkel v. Kennecott Holdings Corp.*, 2001 U.S. App. Lexis 402 at *23 (10th Cir. 2001); *Wolf v. Coca-Cola*, 200 F.3d 1337, 1343-44 (11th Cir. 2000); *May v. Shuttle*, 129 F.3d 165, 171 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 927 (1998).

The three cases cited by Petitioners concerning this alleged point of error, moreover, all expressly articulate the "specific intent" requirement. *See Petition* at 14 (citing *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755 (5th Cir. 1996); *McGann v. H&H Music Company*, 946 F.2d 401 (5th Cir. 1991); and *Hines v. Massachusetts Mutual Life Ins. Co.*, 43 F.3d 207 (5th Cir. 1995)). In *Rogers* the court held, "To establish a prima facie case under § 510 of ERISA, [the plaintiff] must prove that [the defendant] acting with specific discriminatory intent . . . interfered with any right to which [the plaintiff] may have become entitled under the Benefit Plan." 87 F.3d at 761 (citing *Hines* and *McGann, supra*). In *McGann* the court stated, "at trial, [the plaintiff] would bear the burden of proving the existence of the defendants' specific discriminatory intent as an essential element of either of his claims." 946 F.2d at 401 (citing *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 881 (9th Cir. 1989) (employee must prove employer's specific intent to retaliate for employee's exercise of

rights under plan"); *Clark v. Resistoflex Co.*, 854 F.2d 762, 770 (5th Cir. 1988) (employee must prove specific intent to interfere with employee's pension rights); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988) (section 510 claimant must prove specific intent to engage in activity prohibited by section 510); *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987) (claimant must prove specific intent to violate ERISA)). Similarly, in *Hines* the court reiterated, "An essential element of a Section 510 claim is proof of defendant's specific discriminatory intent." 43 F.3d at 201 (citing *McGann, supra*).

It is difficult to understand how Petitioners can argue that the application of this standard is incorrect when they can cite no authority, whatsoever, to support their position. The Fifth Circuit Court of Appeal's *per curiam* opinion, moreover, provides no basis for Petitioner to argue that the words "specific intent" were meant to resurrect some type of "pretext plus" standard. The summary judgment record and hearing transcript make clear that this case was not decided based upon a "pretext plus" standard but rather on the Petitioners' failure to provide any evidence from which to infer The Moody Foundation's intent to deprive Scheve of her ERISA benefits. *See Petition, App. D* at 12-31.

Petitioners' purported basis for claiming that the Fifth Circuit is again attempting to resurrect a "pretext plus" standard is *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). *Reeves*, however, simply does not support Petitioners' argument. First, *Reeves* was an ADEA case and the unique ERISA specific intent requirement was therefore not addressed. More important, the *Reeves* plaintiff introduced evidence that (1) the reasons given by

the employer were false and (2) the owner of the company had demonstrated age-based animus in his dealings with the plaintiff. *Reeves*, 530 U.S. at 138. Summary judgment was granted against Scheve precisely because she failed to produce any evidence to show that the reasons given were false or that the true reason was to deny Scheve her ERISA benefits.

To make an ERISA claim, an employee can satisfy his or her *prima facie* burden by relying on either direct or circumstantial proof of the employer's intent. *See, e.g., Garratt v. Walker*, 164 F.3d 1249, 1256 (10th Cir. 1998) (en banc). When the plaintiff uses circumstantial evidence, the *McDonnell Douglass Corp. v. Green*, 411 U.S. 792 (1973), burden shifting analysis is typically employed with the "specific intent" inquiry part of the third phase of this analysis. *See, e.g., Gitlitz v. Compagnie Nationale Air Fr.*, 129 F.3d 554, 559 (11th Cir. 1997); *Gavalik*, 812 F.2d at 852; *Barbour*, 63 F.3d at 37. Through this circumstantial evidence, a plaintiff can demonstrate specific intent by showing that the employer was motivated, at least in part, by the desire to deprive the plaintiff of ERISA benefits. *See Holtzclaw*, 255 F.3d at 260. Although specific intent can be shown with circumstantial evidence, it must be more specific than mere conjecture. *Jefferson*, 102 F.3d at 964. Petitioners never provide anything more than subjective speculation and conjecture. *See Petition, App. D* at 12-31.

Petitioners' contention that "temporal proximity" suggests violation of ERISA is not supported by the record. There are simply no events – temporally related or not – from which to infer the requisite intent. As examples of "temporal proximity" leading to an inference

of specific intent, Petitioner cites two cases where employees were fired shortly before their pensions were to vest. *See Petition* at 18 (citing *Humphreys v. Bellaire Corp.*, 966 F.2d 1037 (6th Cir. 1992) and *Stafford v. True Temper Sports*, 123 F.3d 291 (5th Cir. 1997)). The requisite inference might arise in circumstances such as *Humphreys* because the employer knows when a pension will vest and plainly will benefit financially by preventing the pension from vesting. Such circumstances, however, are easily distinguishable from Scheve's situation. Moreover, there typically needs to be more evidence than just the timing of events to raise an inference of specific intent. In *Stafford*, the court of appeals affirmed summary judgment despite the fact that the plaintiff was terminated just three weeks prior to the date his pension would vest.

"A reason cannot be proved to be a 'pretext for discrimination' unless it is shown both the reason is false, and that the discrimination is real." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). Scheve neither showed that The Moody Foundation's reasons were false nor tendered a scintilla of evidence that provides a nexus between the Pap smears and The Moody Foundation's decision to terminate her. The district court and the appeals court properly rejected the argument that, whenever a person with a possible health problem is fired, the firing must be due to the possible health problem. Scheve's argument is particularly untenable where, as in this case, the health "problem" is so minor.

In sum, Petitioners' assertions that the requirement of "specific intent" conflicts with Supreme Court precedent (*Petition* at 15-16), and conflicts with other circuits (*Petition* at 17-20), are frivolous. Petitioners cite no violations

of Supreme Court precedent and all of the courts of appeals have clearly enunciated the "specific intent" requirement for ERISA cases.

Issue II: The District Court and Court of Appeals Imposed Sanctions in Retaliation for Using Recusal Statutes

Judge Kent recused from this action in January of 1999 and the case was transferred to the docket of Judge Hughes. Judge Kent had nothing to do with the judgment in this case. Yet, rather than concentrating on the merits of Scheve's ERISA claims, Petitioners throughout the district court and appellate court proceedings have attempted to make Judge Kent's recusal an issue in what amounts to personal attacks upon the judge.

Petitioners' claim that Judge Hughes "explicitly retaliated against Petitioners for attempting to protect their constitutional right to an impartial forum by filing a recusal motion." *Petition* at 21. To support this contention, Petitioners rely on out-of-context snippets from the hearing on The Moody Foundation's fee-shifting motion. *Id.* (citing *App. E* at 47, but meaning to cite *App. F* at 47).

The hearing transcript establishes that the district court's decision to shift fees in favor of The Moody Foundation, and against both Scheve and her counsel, was not based on the recusal of Judge Kent. Judge Hughes noted the untrue but easy-to-verify facts alleged by Petitioners; catalogued the various improper and vexatious tactics employed by Scheve and her counsel; addressed all the legal elements for imposition of fee-shifting under the court's inherent power, under ERISA, under Rule 11, and

under 28 U.S.C. § 1927; and determined the reasonableness of the fees awarded. Judge Hughes' comment that the recusal motion *might* have been a sign of bad faith was to make a point: it seemed odd that, once it became clear that Petitioners had made gross misstatements of fact in their complaint, rather than dismiss the case or amend their pleading, Petitioners instead asked for the recusal of the presiding judge. At any rate, as Judge Hughes' extensive findings and conclusions clearly demonstrate, the comments about recusal were not central to the district court's judgment.

For reasons not altogether clear, Scheve and her counsel continue their attacks on the judges rather than concentrating on the merits of their claims and defenses. True to style, Petitioners declare that Judge Hughes "had been sharply rebuked by another appellate panel for exactly that type of 'fact finding' analysis employed at summary judgment." *Petition* at 21 n.18 (citing *Coleman v. Houston Ind. Sch. Dist.*, 113 F.3d 523, 535 (5th Cir. 1997)). That the district judge may have made an incorrect ruling in a prior case, however, has no bearing on determining whether he made an incorrect ruling on The Moody Foundation's summary judgment motion and certainly has nothing to do with Petitioners' allegation of "imposition of sanctions in explicit retaliation against use of the recusal statutes."

Petitioners also list four instances purportedly demonstrating "judicial retaliation." *Petition* at 23-24. These out-of-context tidbits, however, fail to reflect the import or the true meaning of the court's comments. Review of the entire summary judgment and fee-shifting hearing transcripts demonstrates that none of the four instances

cited support Petitioners' argument. The district court's assessment of fees against Scheve's counsel was not based upon the motion to recuse Judge Kent but instead properly based upon sanctionable conduct which occurred in the presence of the court or appeared in the record and briefs before the district court. *See Travelers Ins. Co. v. St. Jude Hospital of Kenner, LA, Inc.*, 38 F.3d 1414, 1418 (5th Cir. 1994); *Kapco Mfg. Co. v. C & O Enters, Inc.*, 886 F.2d 1485, 1495 (7th Cir. 1989).

Petitioners' claim that their due process rights were somehow abridged because the district court based its decision upon Petitioners' request for recusal of Judge Kent is without merit. The request for review of this issue by the Supreme Court pursuant to its "supervisory power" (*Petition* at 20) is not brought in good faith and should be denied.

Issue III: The Court Improperly Assessed Attorneys' Fees Against Scheve's Counsel

Petitioners contend that the award against Scheve's counsel, Mark W. Stevens, is improper because (1) the trial court's findings were vague and (2) the court of appeals improperly applied an "abuse of discretion" standard of review.

The district court's findings of fact and conclusions of law concerning fee-shifting are anything but vague. The district court analyzed each basis for shifting fees; made express rulings concerning each of these bases including specification of whether the fee was shifted as compensation to The Moody Foundation or instead for the purpose of deterring frivolous and vexatious litigation; determined the reasonable amount of attorneys'

fees; and specified the liability of each Scheve and her counsel for payment of such fees. *See Petition App. F* at 38-50.

Petitioners, furthermore, should not be complaining for the first time, in a Petition for Writ of Certiorari, that the court of appeals improperly applied the "abuse of discretion" standard of review. Rule 28(a)(9)(B) of the Federal Rules of Appellate Procedure requires an appellant's brief to provide "for each issue, a concise statement of the applicable standard of review." Petitioners completely ignored this rule, as they have others, and did not specify any standard of review in their appellants' brief. After The Moody Foundation specified the abuse of discretion standard in its appellee's brief, Petitioners failed to object in their reply brief to the standard specified by The Moody Foundation. Because Petitioners never requested the Fifth Circuit Court to apply some alternative standard of review, Petitioners should not now complain of the standard applied. *See, e.g., United States v. Cotnam*, 88 F.3d 487, 499 (7th Cir. 1996). Interestingly, although Petitioners now contend that application of the "abuse of discretion" standard was wrong, they do not specify what standard would have been correct.

Petitioners do not articulate a legitimate basis for issuance of a writ of certiorari pursuant to Supreme Court Rule 10(2). The request for Supreme Court review of the fees assessed against Stevens, accordingly, should be denied.

Issue IV: The Court Improperly Assessed Attorneys' Fees Against Scheve

Petitioners contend that judgment taxing attorneys' fees against Scheve should be vacated because Scheve "was clearly judgment proof" and because such fee-shifting would "dissuade similarly situated plaintiffs from bringing suit." These seemingly contradictory arguments are both factually and legally deficient.

First, although an affidavit from Scheve indicates her limited resources, there is no evidence in the record that Scheve is judgment proof. Petitioners introduced no evidence at trial, in the court of appeals, or attached to the Petition to establish that Scheve was or is judgment proof. The district court noted that Scheve, "apparently, from what The Foundation tells me, is probably not able to satisfy the award, but she does need to be deterred." *Petition, App. F* at 46. This observation concerning Scheve's financial circumstances, equivocally stated and expressly based upon hearsay, is neither evidence nor a court finding that Scheve is judgment proof.

Second, Petitioners' reliance on *Kimbro v. Atlantic Richfield Co.*, 899 F.2d 869 (9th Cir. 1989), the only authority cited by Petitioners to support their ERISA fee-shifting argument, is misplaced. In *Kimbro*, the appellate court affirmed the district court's denial of the defendant's request for fee-shifting largely because the ERISA claim was a collateral issue and the district court has expressly determined that the ERISA claim was not brought in bad faith. *Kimbro*, 899 F.2d at 881-82. In the instant case, on the other hand, the district and appellate courts determined that Petitioners' failure to investigate the factual basis of

the claims, coupled with Petitioners' refusal to end the litigation after it became clear that the claim could not be sustained, constitute bad faith.

Third, the district court properly applied the fee-shifting factors specified by controlling law. In *Iron Workers Local #272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980), the Fifth Circuit Court specified the factors to consider in determining the award of fees and expenses under ERISA: (1) degree of the opposing parties' culpability; (2) ability of opposing parties to satisfy an award of attorney's fees; (3) whether an award of attorney's fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. Scheve's ability to satisfy an attorneys' fees assessment is therefore a factor to consider, not a prerequisite. The district court expressly considered Scheve's inability to satisfy the award. *Petition, App. F* at 46. The court also determined that *Bowen* factors (1), (3) and (5) weighed so heavily in favor of awarding fees to The Moody Foundation that, in balancing all the factors, an award of attorneys' fees was required. *Petition, App. F* at 41-50.

Fourth, the propriety, and even the necessity, of fee-shifting against Scheve is confirmed by the recent Seventh Circuit decision *Senese v. Chicago Area I. B. of T. Pension Fund*, 237 F.3d 819 (7th Cir. 2001). In *Senese*, the district court's denial of the defendant's requests for fee-shifting and for Rule 11 sanctions was reversed. The plaintiff, Senese, alleged several violations of ERISA. A

reasonable investigation would have established that one of the claims, concerning 1992 benefits, was groundless. On appeal, the court held:

> The district court denied the Fund's motion for attorneys' fees based on its finding that Senese's claims were substantially justified and were not pursued in bad faith, and that Senese's claims for interest were not entirely groundless. However, as we discussed above, we conclude that Senese's claim for 1992 benefits was frivolous, and because, with respect to this claim, the basis of the court's decision on fees was clearly erroneous, it was an abuse of discretion.

Senese, 237 F.3d at 826.

The Seventh Circuit Court also determined Rule 11 sanctions were required, concluding that "based on the facts known to Senese (and with reasonable investigation, should have been known to his lawyer) neither Senese nor his lawyer could have reasonably believed" at the time the amended complaint was filed, that the evidence supported Senese's claim to 1992 benefits. *Id.* at 824. "The district court's conclusion to the contrary was clearly erroneous, and under these circumstances, sanctions were warranted." *Id.* at 824-25.

Petitioners' contention that the district court's award might do great damage to ERISA by dissuading similarly situated plaintiffs from bringing suit is without merit because dissuading plaintiffs with frivolous claims is, under well established law, a purpose of fee-shifting. *See Petition* at 28 n.6. Under its inherent power, the district court properly shifted fees to do just that: dissuade similarly situated plaintiffs – that is, those with patently

frivolous claims – from filing lawsuits. *Petition, App. F* at 49. Under *Bowen*, likewise, the degree of Scheve's culpability or bad faith, whether fee-shifting would deter persons acting under similar circumstances, and the relative merits of the parties' position, are factors the court is *required* to consider. *See Bowen*, 624 F.2d at 1266; *Dial v. NFL Player Disability Plan*, 174 F.3d 606, 613-14 (5th Cir. 1999).

Petitioners do not allege that the *Bowen* fee-shifting standard applied by the district court and affirmed by the Fifth Circuit Court of Appeals conflicts with either Supreme Court precedent or with the standards applied in other circuits. Although each circuit has articulated its own ERISA fee-shifting test, they are all substantively similar. As noted by the Seventh Circuit Court of Appeals, "whatever approach is used, the bottom-line question is essentially the same: was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent?" *Meredith v. Navistar*, 935 F.2d 124, 128 (7th Cir. 1991).

The district court carefully analyzed each of the factors enumerated in *Bowen*, determined that Scheve did not prosecute the action in good faith, and explained each of the bases for the fee-shifting. Petitioners, on the other hand, fail to provide an analysis under *Bowen* or under any other proposed standard and cite neither evidence nor legal authority which raises an issue appropriate for a writ of certiorari.

CONCLUSION

Petitioners are not entitled to review on a writ of certiorari because they fail to show that the Fifth Circuit Court of Appeals' decision in favor of The Moody Foundation is in conflict with the decision of another United States court of appeals on the same issues; that it any way conflicts with a decision by a state court of last resort; or that it departs, or sanctions departure from, the accepted and usual course of judicial proceedings. The district court correctly applied the law to the facts and the court of appeals properly affirmed the district court's judgment, which is sustainable on any of the several alternative basis for fee-shifting. *See also Forsyth v. Barr*, 19 F.3d 1527, 1534 n.12 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994) (a district court's grant of summary judgment may be affirmed on grounds supported by the record other than those relied on by the court). The Petition for Writ of Certiorari should therefore be denied.

THE MOODY FOUNDATION REQUESTS AWARD OF COSTS AND ATTORNEYS' FEES AS DAMAGES

Petitioners' continued prosecution of this case has been vexatious and their Petition for Writ of Certiorari is frivolous. The complete absence of facts supporting Scheve's ERISA claim, to say nothing of the warnings from two district court judges and one court of appeals panel, have not proved a deterrent. Instead of focusing on the substantive facts and issues of Scheve's claim, Petitioners continue to interject speculative conspiracy theories, continue to misstate both the relevant facts and the

applicable law, and continue personal attacks on the judges involved in the case. Virtually every document filed with the court or generated in response to discovery requests, and the conduct of Scheve's counsel at hearings, evidences unreasonable and vexatious conduct which resulted in avoidable costs.

Mark Steven is not a wet-behind-the-ears attorney unaware of the need to investigate facts before alleging them in pleadings, ignorant of the procedures for preserving error in the trial court, or inexperienced in preparing briefs containing concise and logically presented arguments. Rather, he is a Harvard law school graduate and he has developed a law practice which includes extensive experience in both state and federal trial and appellate courts.

Pursuant to Rule 42(2) of the Supreme Court Rules, when a petition for writ of certiorari is frivolous, the Court may award the respondent damages and costs. Such damages may be awarded against both party and counsel. In the instant case, Scheve's counsel, Mark Stevens, is also a party. The Moody Foundation asks the Court to award damages in the amount of the attorneys' fees reasonably incurred for the preparation of this response to the Petition, plus costs. Based upon counsel's conduct in pursuing this Petition, as well as his representations that Scheve is "judgment proof," The Moody Foundation asks that the damages be assessed against Scheve's counsel, Mark Stevens.

PRAYER

Respondent, The Moody Foundation, prays that the Petition be denied and that costs plus damages in the amount of the reasonable attorneys' fees incurred by The Moody Foundation in defending against the Petition, be assessed against Petitioner Mark W. Stevens.

Respectfully submitted,

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